

APPEALS FOR TRIAL PROSECUTORS

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APAAC Training Center
Phoenix, Arizona



LOWER COURT APPEALS & BEGIN STATE'S APPEALS & SPECIAL ACTIONS

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State v. Miley Cyrus – A DUI

THE FACTS:

- Cyrus drinks alcohol, smokes pot and then drives her Ferrari on the Loop 101
- Cyrus gets pulled over by DPS for a broken tail light on her Ferrari
- DPS notices an odor of alcohol and marijuana about Cyrus' person
- DPS begins a DUI investigation
- Cyrus refuses to perform FSTs, a PBT, a breath test and tells DPS she will not submit to a blood test.
- Cyrus demands to consult with an attorney.
- DPS arrests Cyrus and takes her to a substation
- At the substation Cyrus is given a phone and a private room to consult an attorney
- Cyrus tries calling Larry Kazan but he does not answer his phone
- DPS gets a search warrant and draws Cyrus' blood
- Cyrus has a 0.23 BAC with active THC

THE CASE AND APPEAL:

- Cyrus claims DPS did not provide her a phone or a private room to call an attorney
- Larry Kazan files a Motion to Suppress/Dismiss the blood test results
- An evidentiary hearing is held. Cyrus loses.
- Cyrus submits her case on the police reports to avoid a trial.
- Cyrus is convicted
- Larry Kazan files a Lower Court Appeal
- Oral argument is held
- Cyrus loses her appeal
- Larry Kazan files a Petition for Review with the Court of Appeals
- The Court of Appeals grants review and denies relief
- Larry Kazan files a Petition for Review with the Arizona Supreme Court
- Justice Bales grants review and holds oral argument
- The Arizona Supreme Court issues an opinion upholding Cyrus' conviction

Lower Court Appeals Checklist

If the State is the Appellant:

- Do you have an appealable order or is this a special action?
- File the Notice of Appeal and Designation of Record within 14 calendar days of the ruling appealed from
- Order the relevant CDs from the trial court
- If the CD is 90 minutes or longer (Maricopa County Local Rule 9.4(b)) get it transcribed (In Gila and Graham Counties, the rule is one hour)
- Order a copy of the court file including any exhibits
- Order the trial prosecutor's file
- File the Opening Memorandum within 60 calendar days of the deadline to file the Notice of Appeal
- Ask for Oral Argument in the caption of the Opening Memorandum if desired

If the State is the Appellee:

- Was the Notice of Appeal timely filed or should you move to dismiss it in a procedural motion?
- Is the order sought to be appealed from appealable? If not, move to dismiss in a procedural motion.
- File a Designation of Record, if necessary, within 14 calendar days of the filing of the Appellant's Designation of Record
- Order the relevant CDs from the trial court
- Order a copy of the trial court file
- Order the trial prosecutor's file
- File the Answering Memorandum within 30 calendar days of filing of Appellant's Opening Memorandum.
- Ask for oral argument in the caption of the Answering Memorandum if desired



Lower Court Appeals

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State v. Miley Cyrus – A DUI Case



She drank, she smoked, she drove



What is a lower court appeal?

“Trial court” municipal or justice court

“Superior court” appellate court



What is an appealable order?

- ♦ 13-4032 Appeal by the State
- ♦ 13-4033 Appeal by the defendant



What rules govern lower court appeals?

- ❖ Superior Court Rules of Appellate Procedure-Criminal
- ❖ Superior Court Local Rules



Deadlines for filing a lower court appeal?

14 calendar days- jurisdictional



What are the defendant's conditions of release on appeal?

❖ Rule 7.2





How can trial prosecutors help build a good record for review?

◆ Case log and file



What if the record is insufficient for review?

◆ Preference for new trial in municipal or justice court



What are procedural motions?

–Motions to dismiss



What are the requirements for the Appellate Memoranda?

- ❖Facts
- ❖Argument
- ❖Conclusion



Possible dispositions of lower court appeals?

- ♦ Reverse and remand for a new trial
- ♦ Reverse and direct a verdict of acquittal
- ♦ Affirm and remand
- ♦ Affirm and modify sentence



What are the provisions for rehearing?

- 14 calendar days
- No oral argument



What are the options for further review?

- ◆ Limitation in 22-375(A)



Lower Court Appeals Checklist

- ◆ State as the Appellant
- ◆ State as the Appellee

LOWER COURT APPEALS

What is a lower court appeal?

The Superior Court is the appellate court in these appeals and the trial court is the city or justice court.

What is an appealable order or judgment?

13-4032 Appeal by the State:

- (1) order dismissing indictment, information, complaint or a count thereof;
- (2) order granting a new trial;
- (3) ruling on a question of law adverse to the State when a defendant appeals (cross-appeal);
- (4) an order made after judgment affecting the substantial rights of the State or a victim – note if the appeal is on behalf of the victim it must be made at the victim's request. (examples restitution order or trial judge's denial of State's motion to withdraw from plea agreement);
- (5) an illegal sentence;
- (6) an order granting a motion to suppress – note the cases limit appealable suppression orders to those that suppress on a constitutional basis, other grounds of evidence preclusion must be challenged by special action; and
- (7) a judgment of acquittal of one or more offenses that is entered after a verdict of guilty.

13-4033 Appeal by a Defendant:

- (A)(1) a final judgment of conviction or a verdict of guilty except insane;
- (2) an order denying a motion for new trial
- (3) an order made after judgment affecting the substantial rights of the party;
- (4) a sentence on the grounds it is illegal or excessive.
- (B) In noncapital cases a defendant may not appeal from a judgment or sentence entered pursuant to a plea agreement or an admission to a probation violation.

22-371(A) The defendant in a criminal action may appeal to the Superior Court from the final judgment of a justice or municipal court.

22-371(D) A defendant may not appeal from a judgment or sentence entered pursuant to a plea agreement or from an admission to a probation violation.

What rules govern lower court appeals?

Rule 30.1(b), Arizona Rules of Criminal Procedure states that the Superior Court Rules of Appellate Procedure-Criminal govern.

Rule 1(a) Superior Court Rules of Appellate Procedure-Criminal states that these rules govern criminal appeals in an action from the justice or municipal courts. When civil and criminal traffic cases are consolidated, the rules governing criminal appeals apply.

Superior Court local rules also apply to the extent they dictate format or have specific rules for lower court appeals.

What are the deadlines for filing a lower court appeal?

The notice of appeal must be filed with the trial court (that means the municipal or justice court) within **14 calendar days** of the date of the order, judgment, sentence or ruling appealed from except a notice of delayed appeal shall be filed within 14 calendar days after entry of an order granting a delayed appeal. Rule 4(a), Superior Court Rules of Appellate Procedure-Criminal.

It must be received by the court within the allotted time. Rule 3(a). There is no extra time afforded for mailing. Rule 1(e), and filing a motion for reconsideration does not enlarge the time. Only a defendant can file a delayed appeal upon making the appropriate showing under Rule 32.1(f) of the Arizona Rules of Criminal Procedure.

Failure to timely file a notice of appeal is jurisdictional, requiring dismissal of the appeal.

The notice of appeal must identify the order, judgment, sentence, or ruling appealed from. Rule 3(b), Superior Court Rules of Appellate Procedure-Criminal.

The appellant must file an original and copy of the designation of record within 14 calendar days of the date of the order, judgment, sentence or ruling appealed from. Rule 7(d), Superior Court Rules of Appellate Procedure-Criminal. The record on appeal will include the notice of appeal, the charging document, the sentence, the order that is the subject of the appeal, motions, exhibits, and the CD or transcript. Rule 7(c). The opposing party (appellee) files its designation of record within 14 calendar days of the filing of the appellant's designation. Rule 7(d). Whether you

are the appellant or appellee, you must make sure that you designate anything not included that is needed to decide the issues in your appeal (oral argument on suppression motion, closing arguments, jury instructions etc.)

What are the Defendant's Conditions of Release on Appeal?

Conditions of release and the posting of bond pending appeal are governed by Rule 7.2, Arizona Rules of Criminal Procedure. The posting of bond is not a condition of the right to file an appeal. Rule 6(a), Superior Court Rules of Appellate Procedure-Criminal.

The execution of sentence is stayed pending appeal when a defendant posts a bond pursuant to Rule 7.2 or when an appeal is taken on the defendant's own recognizance. But an order requiring the payment of restitution shall not be stayed and restitution is paid to the clerk of the court during the pendency of the appeal.

In appeals from limited jurisdiction courts, a defendant convicted and sentenced to jail shall remain under the same release conditions previously imposed pending appeal. The defendant's release will be revoked if he fails to diligently prosecute the appeal. Rule 7.2(c)(2)(A), Arizona Rules of Criminal Procedure. The State or the court on its own motion may move to amend the conditions of release on appeal when there appears a substantial risk to another person or the community or the defendant is unlikely to return to court. Rule 7.2(c)(2)(B).

How can trial prosecutors help build a good record for review?

From an appellate standpoint, you want the best trial court record possible as with any appeal. The problem is these trial courts are hit and miss. Often there are no minute entries for dates that the docket indicates a hearing took place. This hearing may be relevant for the appeal and you may have to order the FTR. Please put dates and relevant rulings in your case log so that when the person doing the appeal orders the trial file, he or she will know what hearings to order. Otherwise defense attorneys may mischaracterize or flat out make up what took place (Rule 8 special action example)

Please respond to motions and keep a copy of everything in your case file since the court file may be lacking.

What if the record is insufficient for review?

Suppose the CD of the suppression hearing you are appealing from does not play or a trial CD was accidentally destroyed by the justice court? Although the rules are somewhat contradictory, the preference is for a do over in the trial court rather than a de novo proceeding in the Superior Court although both are discussed in the rules.

Rule 2(d), Superior Court Rules of Appellate Procedure-Criminal states that if the Superior Court determines that the record is insufficient to determine the issues, a trial de novo shall be held in Superior Court.

If it appears to the trial court (that is the justice or municipal court) that the record is insufficient, the court may on its own motion or the motion of any party reset the case for trial. Appeal rights run from the entry of judgment or order following the new trial. The preference is for a new trial at the trial court level. Cases summarily transferred to the Superior Court for a trial de novo due to an insufficient record may be remanded for a new trial in the trial court. Rule 7(g), Superior Court Rules of Appellate Procedure-Criminal.

Cases summarily transferred to the Superior Court for a trial de novo or determined by the Superior Court to have an insufficient record may be remanded to the original trial court for a new trial. Unlike a trial de novo held in Superior Court, the parties in a case remanded for a new trial in the original trial court shall have the right of appeal. Rule 9.10(e), Maricopa County Superior Court Local Rules.

What are procedural motions?

Procedural motions are motions on issues that determine whether the appeal should go forward. These could be motions to dismiss for an untimely filed Notice of Appeal or a motion to dismiss an appeal that was not filed from an appealable order. Procedural motions are filed in the trial court but ruled on by the Superior Court. Rule 8(c)(1), Superior Court Rules of Appellate Procedure-Criminal. Such motions should be captioned: "Procedural Motion-Refer to Superior Court" and the response: "Procedural Motion Response-Refer to Superior Court." Rule 8(c)(3). While such motions are pending, other deadlines are suspended. If the appeal is allowed to proceed, further papers are filed in the Superior Court. Rule 8(c)(4).

What are the requirements for the Appellate Memoranda?

The Appellant's Opening Memorandum must be filed and served on the same day (note the court serves those of indigent defendants) Rules 8(a)(1), 14, Superior Court Rules of Appellate Procedure-Criminal.

The Appellant's Opening Memorandum must be filed within 60 calendar days from the deadline to file the notice of appeal. The Appellee's Answering Memorandum is due within 30 calendar days of the filing date of the Opening Memorandum. No reply is to be filed, Rule 8(a)(2), Superior Court Rules of Appellate Procedure-Criminal.

Motions for additional time to file memoranda must be made to the trial court. Rule 8(b), Superior Court Rules of Appellate Procedure-Criminal.

If no Appellee's Answering Memorandum is filed, the appeal shall be submitted on the record. It shall not constitute a confession of error. *Id.* But see Gila County Local Rule 31(C) which states that if the appellee fails to file a timely memorandum, the court may deem the appellee to have confessed error.

The memoranda shall include:

- A short statement of facts with references to the record
- An argument with legal issues presented and citing authority
- A conclusion with the precise remedy sought on appeal

Rule 8(a)(3), Superior Court Rules of Appellate Procedure-Criminal

For the purposes of "references to the record" in Rule 8(a)(3) when the record of the proceeding appealed from is an audio or video recording, the rule requires the party to the appeal to cite to the specific portion of the recording at which the evidence is found. *Jordan v. McClennen*, 232 Ariz. 572, 573, ¶ 1, 307 P.3d 999, 1000 (App. 2013).

The memoranda must be on single-sided 8.5 x 11 inch white paper, and double-spaced except for quotes. The page limit is 15 pages exclusive of any appendices. Rule 8(a)(4), Superior Court Rules of Appellate Procedure-Criminal. A motion to exceed the page limit can be made under Rule 8(a)(5) which authorizes the court to waive or modify a rule to insure a fair and just determination of the appeal.

In Maricopa County the font size can be no smaller than 12 point and that applies to the text, quotes, and footnotes. Rule 2.16, Maricopa County Superior Court Local Rules.

In addition to the citation of memorandum decisions as permitted by Rule 111(c) of the Rules of the Arizona Supreme Court, the Maricopa County Local Rules allow the citation of non-published decisions in lower court appeals but only if those decisions are posted on the Superior Court's website. They "may be deemed persuasive, but without binding precedential effect." The place to find these decisions is:

<http://www.superiorcourt.maricopa.gov/superiorcourt/lowercourtandadminappeals/index.asp>

A party desiring oral argument needs to request it in the caption of the memorandum. Rule 11(a), Superior Court Rules of Appellate Procedure-Criminal. In Maricopa County, parties are afforded 15 minutes per side. Rule 9.7, Maricopa County Superior Court Local Rule.

In Maricopa County, once the memoranda have been filed in the trial court, they are transferred to the Superior Court where the case is given an LC number. Rules 9.2(d), Maricopa County Superior Court Local Rule.

What are the possible dispositions of lower court appeals?

- Reverse and remand for a new trial
- Reverse and direct a verdict of acquittal
- Affirm and remand
- Affirm and modify sentence

Rule 12(b)(1)-(4), Superior Court Rules of Appellate Procedure-Criminal.

What are the provisions for rehearing?

Within 14 calendar days after service of a decision or an order any party may file a motion for rehearing. The response is due within 14 calendar days of the motion. No oral argument will be heard. Rule 13(a), Superior Court Rules of Appellate Procedure-Criminal.

What are the options for further review?

22-375(A) limits appeals from Superior Court in actions appealed from an inferior court to those involving the validity of a tax, impost, assessment, toll, municipal fine, or statute. This includes appeals from convictions in the superior court that are the result of a trial de novo. In other cases, special action relief may be appropriate.

AN APPELLATE PRIMER:

The ABC's of Appeals, Special Actions, & Post-Conviction Relief

May 4, 2012

Black Canyon Conference Center
Phoenix, Arizona



LOWER COURT APPEALS

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**Outline for Presentation on Appeals
by William F. Mills**

I. Appeals

A. What can you appeal? What changed on December 12, 2008?

1. A.R.S. § 13-4032(1)-(7) provides the answers. You may appeal:

An order: 1) dismissing your case or a count of your case, 2) granting a new trial, 3) on a question of law adverse to the state when the defendant was convicted and appeals from the judgment (cross-appeal), 4) made after judgment affecting the substantial rights of the state or a victim, except that the state shall only take an appeal on an order affecting the substantial rights of a victim at the victim's request, 5) a sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by § 13-702, § 13-703, § 13-704 or § 13-706, subsection A, 6) granting a motion to suppress the use of evidence, 7) a judgment of acquittal of one or more offenses charged that is entered after a verdict of guilty offenses.

2. *State v. Bejarano*, 219 Ariz. 518, 200 P.3d 1015 (App 2008), changed the playing field in a major way. Discovery sanction "suppression" of evidence can no longer be appealed. You will have to attempt a special action instead. Former authority under *State v. Rodriguez*, 160 Ariz. 381, 382-83, 773 P.2d 486, 487-88 (App.1989) division one, was disavowed by division two in this case and later was expressly agreed to by division one in *State v. Roper*, 225 Ariz. 273, 236 P.3d 1220 (App. 2010).

B. How to begin? How much time do you have to file a notice of appeal? Is it jurisdictional? Calendar or work days?

1. Criminal Rules of Procedure, Rule 30.1(b) specifies that appeals on the record are governed by the Superior Court Rules of Appellate Procedure - Criminal (SCRAP-CRIM). SCRAP-CRIM became effective in June of 2003. Rule (1)(a) explains that these rules control all criminal action appeals from the justice or municipal courts to the superior court. Rule 1(b) says that the Criminal Rules of Procedure for appeals from superior court to the court of appeals & supreme court govern where these rules do specify a procedure, insofar as that is practicable. Rule 3 says to file your notice of appeal with the trial court. Rule 4 says you have 14 calendar days (not work days) after the entry of the order, judgment of sentence appealed from. (Except for delayed appeals, see Criminal Rule 32.) Rule 1(e) explains start and stop days.

2. A timely notice of appeal is the one thing that is jurisdictional and cannot be waived. See *Arizona Appellate Handbook*, Vol 1-B, §4.2.3.1, p.4.8; and *State v. Dawson*, 164 Ariz. 278, 281, 792 P.2d 741, 744 (1990); *State v. Johnson*, 78 Ariz. 211, 212-12, 277 P.2d 1020, 1021-22 (1954); *State v. Rodriguez*, 27 Ariz. App. 689, 690, 558 P.2d 717, 718 (1976).

C. What about mailing? If the court mails you notice of the ruling, e-mail, U.S. postal service, interoffice mail, pick-up basket, etc., what then? Rule 1(e) says in part, "Except as stated by these rules or by order of court in a particular case, the filing deadline for motions, responses, and memoranda, are not enlarged when sent by mail.

1. You get 5 more days! Rule 1(e) does not address a notice of appeal deadline. By operation of Rule 1(b), and Criminal Rules of Procedure, Rule 1.3(a), which in part says, "Whenever a party has a right or is required to take some action within a prescribed period ... and such service is made by ... (rules omitted, basically it means by mail - which means by any method other than same day hand delivery), *five days shall be added to the prescribed period.*" *Id.* (*Emphasis provided*). More importantly in *State v. Rabun*, 162 Ariz. 261, 782 P.2d 737 (1989), our Arizona Supreme Court, reviewed this very issue and ruled that the 5 day extension of Rule 1.3(a) is applicable to the time to file a notice of appeal by the State. There, the attorneys for the parties were not in court and the superior court dismissed the charges from the Coconino County Grand Jury by minute entry dated November 30, 1987, but put the state's copy in the county attorney's mailbox in the courthouse. The state would otherwise have been 2 days late in filing its notice of appeal on the 22nd day after the order was filed. The court expressly concluded:

Because we have already passed on this issue in *Savage* and *Duran* and have no wish to upset the accustomed and approved practice that has lead counsel to believe they have five additional days to file notices and petitions, (in those matters) we hold that Rule 1.3 applies to Rule 31.3 just as it does to Rules 10.2 and 32.9, both of which also prescribe time running from an event.

D. What about the record on appeal and the use of transcripts typed up by your office secretary or the defense attorney's secretary? (No & Yes)

1. Rule 1(f) defines an "authorized transcriber" as a, "certified court reporter of a transcriber under contract with an Arizona court." Rule 7 requires the appellant to make arrangements with authorized transcriber(s) to pay for the record on appeal. However Rule 8 allows the parties to stipulate to a substitute, so if you agree, then someone else could prepare either a transcript or joint statement of facts and issues.

E. You need more time to finish your appellant's or appellee's memorandum. What do you do? Who do you ask? Do you need a stipulation from your opposition?

1. Rule 8(b) holds the answers. You simply ask a trial level judge (presiding is good) other than the one who presided over the issue on appeal, and show good cause. No response is allowed, "unless authorized by the court." So while it is a good practice to get agreements for extensions of time, they are not required.

F. What is a "Procedural Motion" and why and how should I use one?

1. Nine years after they were created, they are the least understood by superior court clerical staff and some others. They are any motion that could determine whether the appeal goes forward, e.g. a motion to dismiss for late notice of appeal, no right to appeal, appeal after a plea, and they can be made any time after a notice of appeal has been filed. Rule 8(c)(1)

2. A few process points first, per Rules 8(c)(1)&(3), they are filed in your trial court, and can be answered within 14 days by the other side, but are to be captioned as if they are filed in superior court, and must bear the notation in the caption "Procedural Motion - Refer to Superior Court," and are ruled upon by the superior court. After the answer is filed, or the 14 day period after the motion was filed expires, the lower court clerk is to transmit only the motion and any answer to the superior court. Rule 8(c)(5). No reply is allowed, except with permission from superior court (not the trial court). No oral argument is allowed, except with permission from superior court. No record on appeal goes with this, so pay attention to the last part of Rule 8(c)(3), "The parties shall refer specifically to the record as needed and attach such documents as support the motion or response." In other words, make your own record, restricted to just the issue in the motion.

3. Notice in Rule 8(c)(4), that all briefing and record preparation deadlines are suspended while the procedural motion is pending. Under Rule 8(c)(5), the superior court shall direct the remainder of the appeal, if any; including those deadlines. If the appeal continues, it will ask the trial court to forward the record as appropriate.

G. So the court tape recorder or CD recording failed, what now? Trials *de novo*?

1. Can you and your opposition use Rule 7(b) to agree about what the record was at the evidentiary or legal hearing or the trial? If so you can stipulate and proceed. If the record is not sufficient to proceed, be aware that there is a disconnect in the rules. You can first approach the trial court judge, under Rule 7(g), to see if the judge agrees that the record is insufficient for an appeal on the record. If so, the trial court may, on its motion, or a party's motion reset the matter for a new trial (or hearing) within 45 days from such a determination. If such a retrial or rehearing is held, then any appeals rights begin to run anew from the entry of judgment following such rehearing or retrial. Rule 7(g) further expressly provides:

In cases where it appears that the trial record is insufficient, the preference shall be for a new trial at the trial court level. Notwithstanding the foregoing, cases summarily transferred to the superior court for trial *de novo* or determined by the superior court to have an insufficient record (Rule 2(b) & Rule 10(b)?) may be remanded to the original trial court for a new trial or hearing in lieu of a trial *de novo* in superior court. Unlike the parties in a trial *de novo* held in superior court, the parties in a case remanded pursuant to this rule for a new trial in the original trial court shall have the rights of appeal as provided by statute or rule for all litigants following a trial or the entry of an appealable judgment or order.

2. So if you end up doing a rehearing or re-trial at the trial level, you get new rights of appeal from the conclusion of that process. Remember the old style trial de novo in superior court is a form of appeal, and except for the facial validity of a statute, rule, ordinance, etc., there will be no further appeal. Rule 13(b), Criminal Procedure Rule 31, & A.R.S. §22-375.

3. However, be aware of the potential conflict with Rule 10(b), which was not modified to be congruent with newly modified Rule 7(g), above. Rule 10(b) is a hold-out from when most appeals were nearly universally by trials de novo in superior court, because the lower courts did not make a record of the proceedings. It provides that when the trial court record is not sufficient or not available, that the trial court shall notify the parties and summarily transfer the case to superior court for a trial de novo. If your case goes this route, there will be a re-trial in superior court and no appellate briefing need be done.

H. The defendant was convicted, sentenced and filed his notice of appeal, now what about enforcement of the sentence, probation, restitution, fines & fees during the appeal?

1. The process was changed, from when just the jail part of the sentence was stayed for misdemeanors under the Criminal Rules of Procedure to SCRAP-CRIM, Rule 6. Rule 6(a) basically says if the D is released ROR or on bail when convicted, the D remains in the same status as before, under Crim. Rule 7.2. If he is in custody, he stays in custody, and receives credit for his time, just as if no appeal had been filed. Rule 6(b). Rule 6(c) is critical. If the D is ROR or out on bond, then his complete sentence (not just the jail part) is stayed while the appeal proceeds: "'Sentence' shall include any fine, jail term, or other penalty, including a term of probation, imposed by the court." However, "Notwithstanding the foregoing, an order requiring the payment of restitution shall not be stayed, but during the pendency of the appeal restitution payments shall be paid to, and held by, the clerk of the court."

I. When are the appellant's and appellee's memoranda due?

1. Rule 8(a)(2), the appellant's brief is due, 60 calendar days from "the deadline to file the notice of appeal." Say you are the appellant, had 14 days from the order to suppress for lack of RS to stop the car for DUI, and you filed the state's notice of appeal on the 10th day after entry of the order of suppression, you still get the entire 14 day time period. (Always double-check your math!) Or think of it as 74 days from the entry of the order you are appealing from (plus 5 days if by mail).

2. The appellee's brief is due 30 calendar days from "the filing date" of the appellant's memorandum. (Not when you received it!) Please note, "No reply memorandum shall be filed unless authorized by the Superior Court." Rule 8(a)(2). So only ask for it in unusual cases.

J. What goes into an appellate memorandum?

1. Rule 8(a)(3), both the appellant and appellee's memoranda are required to include: "[A] short statement of facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal." If your opposition does not fulfill these requirements, you can file a procedural motion (Rule 8(c)) to strike the pleading, and possibly dismiss the appeal.

2. Rule 8(a)(4) limits your double-spaced memorandum to 15 pages, unless you use Rule 8(a)(5) to modify or waive this requirement in your more complex cases. (You may file the motion for permission to exceed the page limit either before your extended memorandum, or simultaneously - depending upon your risk tolerance and the attitude of your superior court judges!)

K. Oral argument. Do you get it?

1. Rule 11(a) allows the superior court to set oral argument, but says it "[S]hall do so upon request of a party." Just make sure to put your request for oral argument in the caption of your appellate memorandum, in order to lock in your request as a mandatory one.

L. You lost. Are you done?

1. Rule 13(a) provides that either party may file a motion for rehearing of a final order on appeal, with the superior court, within 14 calendar days after service of the decision or order. (You can not do this for an order denying a motion for rehearing. Could you file a motion for a rehearing if the court grants your opponent's motion for rehearing?) Answers must be filed within 14 calendar days of the filing of the motion. (Not receipt!) No oral argument is allowed, unless requested by the court.

2. Either there was no motion for rehearing, or it has now been decided. Where do you go from here? Rule 13(b) tells us there is no further appeal from a final decision or order, *unless* you are pursuing an issue allowed by A.R.S. §22-375. That law provides only for the appeal of the facial validity of the law (not as applied) *State v. Singer*, 190 Ariz. 48-50, 945 P.3d 359, 361 (App. 1997), and expressly says that otherwise there shall be no further appeal. (If you are eligible, follow the process outlined in the Criminal Rules of Procedure, Rule 31.)

3. But you still feel the next higher court needs to grant you relief from the horribly wrong-headed superior court decision against your virtuous legal position. So welcome to the fascinating world of special actions. They are not of right. Your greatest challenge will be to lure the appellate court into taking discretionary jurisdiction of your legal issue(s).

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